# Petition

81-1682

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In The

# Supreme Court of the United States

October Term, 1981

CARL SCACCHETTI,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Did the government fail to prove a prima facie case for the jury that the petitioner committed that extortion affecting interstate commerce as contemplated under the provisions of the Hobbs Act.

2. Did the district court err in refusing to charge, as an essential element to extortion under color of official right, that petitioner's conduct in seeking or requesting payment be motivated by and focus upon the office of the defendant.

3. Did the district court err in refusing to charge that if the jury found that the victim of the defendant's extortion was a person not involved in interstate commerce that the defendant was entitled to an acquittal under the Hobbs Act notwithstanding the defendant's use, in effecting the extortion, of a "middleman" who did conduct business in interstate commerce.

## LIST OF PARTIES

The caption of the case in the Supreme Court contains the names of all the parties to this proceeding.

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In The

# Supreme Court of the United States

October Term, 1981

No. 81-1155

CARL SCACCHETTI,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Carl Scacchetti respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 4, 1982.

### OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, appears in the appendix hereto.

### JURISDICTION

The judgment of the court below was entered on January 4, 1982. Rehearing was not sought. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

## STATUTES INVOLVED

The statute under which petitioner was prosecuted was Title 18, U.S.C., §1951, which provides as follows:

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15 [15 USCS § 17], sections 52, 101-105, 151-166 of Title 29 or sections 151-188 of Title 45 [45 USCS §§ 151-188].

(June 25, 1948, ch 645, § 1, 62 Stat. 793.)

## STATEMENT OF THE CASE

The petitioner, an elected Rochester City Court Judge, was convicted on two counts of a three count indictment entered after a jury trial in the United States District Court for the Western District of New York of affecting commerce by extortion under color of official right in violation of 18 U.S.C. §1951 (Count II) and on Count III for attempting to affect commerce by extortion under color of official right in violation of the same statute (Hobbs Act). The petitioner received concurrent prison terms on each count of one year and a day.

The facts underlying petitioner's indictment and conviction under Count II of the indictment were that some time in the spring of 1979, Albert Tantallo, a Rochester businessman engaged in interstate commerce and a friend of the petitioner, called upon the latter in his capacity as a City Court Judge to "fix" charges then pending before the petitioner against one Christopher Alberti, a friend of Albert Tantallo. The charges related to speeding, a traffic offense and driving without an operator's license, a misdemeanor. That some time later the petitioner asked Tantallo whether Alberti would pay Tantallo for repairs to an automobile owned by a friend of the petitioner. The repairs were later made by Tantallo, the charges against Alberti were dismissed by the petitioner and Alberti paid Tantallo for the cost of the repairs.

With regard to Count III of the indictment, Tantallo, at the urging of the police, called upon the petitioner in December 1979 and asked petitioner to "go easy" on a friend of his (Wesley Hutchinson) against whom there were misdemeanor criminal charges then pending before the petitioner. That during a series of tape recorded conversations between Tantallo and the petitioner relating to Tantallo's interest in the pending criminal charges against Hutchinson, the petitioner requested that he be supplied with a 35 mm. camera which was ultimately supplied by Tantallo through the police. The charges against Hutchinson were never disposed of by the petitioner.

Counts II and III of the indictment named Tantallo as the victim of petitioner's extortion and attempted extortion committed under color of official right and charged under Count II that petitioner affected interstate commerce and attempted to affect commerce under Count III due to the conduct of business in interstate commerce by Tantallo.

At the close of the government's case and on appeal to the Court of Appeals, the petitioner argued that the government failed to prove a prima facie case of extortion under the Hobbs Act in that under no view of the evidence presented, could Tantallo's interest in his interstate business be affected if he refused to comply with petitioner's demands made in exchange for the anticipated favors to be performed by petitioner on behalf of Tantallo's friends (i.e., Alberti and Hutchinson), and that Tantallo's compliance with those demands was gratuitous insofar as Tantallo's interest in his interstate business was concerned.

In petitioner's several requests on the district court to charge the jury, the petitioner, in order to highlight the essential jurisdictional nexus that must be proved by the government, requested the jury be advised that petitioner was entitled to an acquittal if the jury found that the victim of petitioner's demands was not Tantallo but Alberti (Count II) or Hutchinson (Court III), neither of whom were proved to have been involved in commerce.

With respect to the issue of criminal intent, which the Court of Appeals conceded was not definitively charged by the district court, the district court denied petitioner's request for a jury charge that in order to sustain a Hobbs Act conviction of extortion under color of official right, it was not enough that petitioner "use his office as a judge" in demanding something of value. That the jury must be instructed more on the meaning of "use of office." That in order for petitioner to have criminally used his office in obtaining "something of value" he

must have been motivated in making the demand by the position he held as a judge or that his demand for payment must focus on his office as a judge.

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Court of Appeals for the Second Circuit conceded in its decision affirming petitioner's conviction that the facts proved by the government took the Hobbs Act (extortion under color of official right) to its outer limits and therefore decided an important question of federal law which has not been, but should be, settled by this court.

1. The petitioner's conviction and its affirmance by the Court of Appeals squarely raises the issue concerning the meaning of Hobbs Act extortion committed under color of official right and more importantly raises the subtle but threshold issue that has been missed in this very unique case relating to the very concept of extortion and the federal government's interest in the protection of interstate commerce.

Although the legislative history is sparse as it relates to extortion under color of official right, it seems clear that in enacting the Hobbs Act, Congress was concerned with protecting interstate commerce from the levy of blackmail. *United States* v. *Staszcuk,* 517 F 2d 53 (7th Cir., 1975) and *Stirone* v. *United States,* 361 U.S. 121. The protection of the victim himself against extortionate conduct was not the chief aim or purpose behind the enactment of the Hobbs Act because the individual's interest in being free from this kind of conduct was and still is being vigorously protected by the individual states. The Hobbs Act was directed at the protection of interstate commerce from extortion. *United States* v. *Green,* 350 U.S. 415, 420.

It is respectfully submitted that extortion as a concept involves relinquishment of a right by the use of force, duress or

pressure exerted. In the absence of some kind of compulsion, the relinquishment of one's right cannot be said to have been accomplished by means of extortion. Without the use of force or pressure exerted, the victim is free to relinquish or not relinquish his right without threat of injury, *35 C.J.S., p. 355,* and his act of relinquishing a right that he possesses cannot be said to be involuntary.

In all the cases decided by the various circuits upholding a Hobbs Act conviction committed by extortion under color of official right, the reason for the payment to the public official by the victim from the interstate business assets of the latter was the impact or burden that potentially existed on that business if the demand of the public official was rejected. See and cf. *United States* v. *Trotta,* 525 F 2d 1096 (2nd Cir., 1975) cert. den. 425 U.S. 971 (1975) where payment of the political contribution demanded was to help insure the grant of municipal highway contracts; *United States* v. *Braasch,* 505 F 2d 139 (7th Cir., 1974) cert. den. 421 U.S. 901 (1975), where the police induced pay-offs to forgo their harassment and ultimate shutdown of the bars and restaurants which purchased goods in commerce; *United States* v. *Crowley,* 504 F 2d 992 (7th Cir., 1975) where the police pay-off insured a rapid police response in the event of ghetto unrest which threatened the successful operation of the businesses making the pay-offs; *United States* v. *Price,* 507 F 2d 1350 (4th Cir., 1974), where defendant accepted a bribe to insure the issuance of a certificate of occupancy for a motel under construction; *United States* v. *Staszcuk,* 517 F 2d 53 (7th Cir., 1975) where defendant received a bribe not to oppose a zoning change; *Stirone* v. *United States,* 361 U.S. 212 (1960) where the victim made the pay-off to insure the unimpeded movement of sand from out-of-state to his place of business in another state.

In all these cases the demand on the victim was met to help insure the vitality and successful operation of a business which depended for its success on some aspect of interstate commerce.

In these cases the defendant's conduct amounted to an extortion on commerce itself in that the demand by itself affected and impacted on commerce by either depleting the assets of the business if the payment was made or implicitly threatened commerce if the demand was rejected. Once the demand was made interstate commerce suffered in some way or was at least threatened.

It is this "Hobson's choice" with its concomitant threat on commerce which is at the core of the Hobbs Act. If it cannot be said that commerce is threatened by the demand of the public official, then the federal government's interest in a commerce, free of extortionate interference, is totally lacking with a resulting lack of federal jurisdiction.

In the instant case, petitioner's demands on Tantallo could have been totally rejected with impunity insofar as Tantallo's interest in a free flow of commerce was concerned. Petitioner's demands on Tantallo did not relate to favors or acts by the petitioner which could have borne upon Tantallo's business interest. Neither Alberti nor Hutchinson was even an employee of Tantallo. Tantallo's interest in either did not relate in any way to Tantallo's business and consequently petitioner's conduct did not amount to the blackmail or pressure on commerce which is at the core of the Hobbs Act.

The implicit holding of the Court of Appeals that the jurisdictional nexus for a Hobbs Act violation is satisfied by a demonstrated showing that interstate commerce is affected, even if the effect be gratuitously imposed by the victim in seeking judicial favors for others unconnected with his interstate business is to truly emasculate not only the concept of extortion but to extend the purpose of the Hobbs Act far beyond its outer limits and the concerns of Congress for interstate commerce in enacting that legislation.

2. The Court of Appeals conceded that the district court did not definitively charge the jury on the issue of criminal intent

but refused to reverse petitioner's conviction by holding that the district court's charge on "use of power to obtain money" clearly referred to petitioner's purpose and therefore was an adequate substitute on the question of criminal intent.

Criminal intent is an essential element of a Hobbs Act violation. *Morrisette* v. *United States,* 342 U.S. 246 and must be adequately and completely charged to insure due process. *In Re Winship,* 397 U.S. 358 (1970).

The district court's failure to expand upon the concept of "use of office" as it related to the issue of criminal intent by omitting the language of *United States* v. *Braasch,* 505 F 2d 139, cert, den. 421 U.S. 910, to the effect that "the motivation for the payment must focus on the office of the recipient" compounded the harm to the petitioner. The Court of Appeals conceded that in order to sustain a conviction for extortion under color of official right, the government must prove that "the motivation for the payment must focus on the recipient's office" but ignored this deficiency in the district court's charge in deciding that the charge as a whole adequately reflected on the necessity for a finding of criminal intent.

It is submitted that the district court's charge did not reflect the language of *"Braasch"* and was therefore totally inadequate on the issue of criminal intent. That the district court's sterile language on "use of office to obtain money" did not adequately call the jury's attention to the necessity of finding criminal intent, or at least to the necessity of finding that petitioner must focus on his position as a judge as the motivation for his request for the payment of "something of value."

3. The Court of Appeals held that the district court's charge advising the jury that in order to convict the petitioner it had to find that he extorted from Albert Tantallo was adequate and that a negative charge, as petitioner requested, to the effect that

petitioner was entitled to an acquittal if the jury found that either Alberti or Hutchinson and not Tantallo was the victim of the extortion, was unnecessary. The Court of Appeals implicitly conceded that if Alberti or Hutchinson were the victims, under the respective counts, then petitioner would have been entitled to an acquittal because of the absence of any realistic possibility of an effect on interstate commerce. The petitioner's request in this connection would have highlighted the necessity for a jury finding, beyond a reasonable doubt, of the existence of an essential element to the crime charged, to wit: the jurisdictional nexus. Without such a caution, the jury, after finding that the petitioner's conduct was criminally reprehensible, could have very easily ignored the jurisdictional limitation on its power to convict under the Hobbs Act absent a finding that the victim was Tantallo. As a matter of due process as that right relates to the necessity of proof beyond a reasonable doubt of every element of the crime charged, the petitioner was entitled to the charge requested. *In Re Winship*, 397 U.S. 358 (1970).

## CONCLUSION

The judgment below is based upon a unique set of facts insofar as they have been now interpreted as supporting a sufficient jurisdictional nexus to sustain a conviction under the Hobbs Act for extortion under color of official right. The Court of Appeals conceded that the prosecution of this case by the government has now taken the Hobbs Act to its outer limits. In holding that this case has not exceeded the jurisdictional limits of the Hobbs Act, the Court of Appeals has decided a federal question which has never been decided by this court. Although relying upon its own prior decisions and the decisions of other circuits which have previously interpreted the Hobbs Act (and which decisions have been denied certiorari by this court), the decision in this case has completely ignored

the missing link to the requisite jurisdictional predicate for the federal crime under the Hobbs Act, i.e., the burden on commerce from the extortion on interstate commerce, vis a vis, the burden gratuitously imposed on commerce by one whose submission cannot be said to have been realistically motivated by any threat to his interest in commerce.

This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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# Appendix

# OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 62—August Term 1981

(Argued: September 3, 1981 Decided: January 4, 1982)

Docket No. 81-1155

UNITED STATES OF AMERICA,

*Plaintiff-Appellee.*

—against—

CARL SCACCHETTI,

*Defendant-Appellant.*

Before:

NEWMAN and KEARSE, *Circuit Judges,*
and EGINTON, * *District Judge.*

Appeal from a judgment of conviction, after a jury trial, of affecting commerce by extortion under color of official right and of attempting to affect commerce under color of official right, both in violation of the Hobbs Act, 18 U.S.C. §1951.

Affirmed.

* The Honorable Warren W. Eginton of the United States District Court for the District of Connecticut, sitting by designation.

*Opinion of the United States Court of Appeals For The Second Circuit*

NORMAN A. PALMIERE, Rochester, N.Y., *for Defendant-Appellant.*

DAVID ROTHENBERG, Assistant U.S. Attorney (Roger P. Williams, U.S. Attorney for the Western District of N.Y., on the brief), *for Appellee.*

EGINTON, *District Judge:*

The defendant, Carl Scacchetti, appeals from a judgment of conviction on two counts of a three count indictment entered after trial in the United States District Court for the Western District of New York before a jury and Judge Harold P. Burke. The defendant was convicted on Count II for affecting commerce by extortion under color of official right in violation of 18 U.S.C. §1951 and on Count III for attempting to affect commerce by extortion under color of official right in violation of the same statute, popularly known as the Hobbs Act. The defendant received concurrent prison terms on each count of one year and a day.

The defendant is an attorney who was elected Judge of the City Court of Rochester, New York in 1972. Jurisdiction of that court comprised both civil and criminal matters, the latter being limited to misdemeanor jury trials, although the defendant conducted arraignments and bail proceedings for criminal defendants charged with both misdemeanors and felonies.

At some point between 1976 and 1978 the defendant became friendly with one Albert Tantalo, a Rochester businessman who owned various automobile and tire operations in the area. Tantalo purchased a large volume of tires of many brands from locations outside of New York State. Tantalo sold some of his tires through a mail order operation to customers, some of whom lived outside the State of New York, and he advertised in national magazines to generate sales.

Another aspect of Tantalo's business involved the purchase of wrecked cars from State Farm Insurance Company. Some of the cars so purchased would come in from outside New York State. He sold used parts salvaged from the wrecked cars to organizations outside the State of New York.

The evidence presented to the jury on Count II essentially was that Albert Tantalo employed a young man named Christopher Alberti. In the spring of 1979 Alberti's license to drive in New York State was revoked. He continued to drive and was stopped and arrested for speeding and for driving with a license under suspension. His case was pending before the defendant in City Court. Alberti advised Tantalo of the situation, and Tantalo contacted the defendant, who said that he would see if he could help Alberti. There were several adjournments in the matter, ostensibly at the requests of Alberti's lawyer, although in fact Alberti had no lawyer. Finally the defendant dictated a disposition for the records of the City Court as follows:

> "On motion of Judge Willis, the care of Christoford [sic] Alberti, the speeding charge is withdrawn and dismissed and the driving while license suspended is produced and withdrawn." (Gov't. App. 149)

While these events were taking place between May and July of 1979, a concurrent scenario unfolded. The defendant visited Tantalo at one of his places of business and informed him that he had a friend with an automobile that required repair. The defendant told Tantalo that he could help Alberti in his license suspension case, but that he wanted Tantalo to take care of fixing his friend's car. Tantalo had the car repaired for the defendant's friend, who was never billed for the repair work. Tantalo testified that Alberti paid for the repairs.

The evidence presented to the jury on Count III (the attempt) was to the effect that in the fall of 1979 Tantalo was indicted on conspiracy to distribute and possession with intent to distribute cocaine. After his arrest, he began co-

operating with law enforcement authorities. In the course of that cooperation, Tantalo told the authorities about the Alberti incident involving the defendant. At the request of law enforcement agents, Tantalo placed telephone calls to the defendant in the presence of an FBI agent. These conversations were recorded and the tape recordings were presented to the jury. During the course of the conversations, Tantalo requested the defendant to do whatever he could in behalf of one Wesley Hutchinson, scheduled to appear in City Court before the defendant on an assortment of charges. While discussions continued between the defendant and Tantalo about Hutchinson, the defendant at one point mentioned that he wanted Tantalo to do him a favor and that the favor was that Tantalo procure a 35mm camera for the defendant. Law enforcement agents working with Tantalo procured a 35mm camera and a claim ticket for a motor drive attachment, which was not immediately available. The government offered no direct evidence that the defendant had in fact ever done anything in the Hutchinson case, as Tantalo had requested. The government introduced evidence that the defendant did receive the camera, although the evidence was inconclusive about the motor drive. Thereafter, a grand jury returned an indictment against the defendant charging him with violating the Hobbs Act by extortion and by attempting to extort under color of official right. Count II essentially involved the free car repairs that defendant had demanded in exchange for dismissing the Alberti charges. Count III concerned the camera which the defendant had demanded from Tantalo.

Although the defendant has raised nine separate points on appeal, the only issues that appear significant for extended review concern the adequacy of the Hobbs Act charge given to the jury.

Before turning to those central issues, we first dispose of those claims which require only brief discussion. The defendant raises a jurisdictional challenge based upon the alleged insufficiency of evidence presented to the grand jury as to

the interstate nature of Tantalo's businesses. The defendant concedes that *Costello v. United States*, 350 U.S. 359 (1956) forecloses any argument as to the competency of hearsay evidence to support a grand jury indictment, but nonetheless challenges the adequacy of that evidence to satisfy the jurisdictional requirement of effect upon interstate commerce. Even if sufficiency of evidence before the grand jury on a jurisdictional element can be challenged, *see United States v. Costello, supra*, 350 U.S. at 363 (indictment valid on its face suffices to call for trial on the merits), the grand jury in this instance heard sufficient evidence concerning interstate aspects of Tantalo's business. The trial court's denial of defendant's motion to dismiss the indictment in the instant case was correct.

Defendant next claims that the trial court erred in failing to dismiss the indictment on grounds that the evidence offered at the trial constituted a material variance to the allegations set forth in the indictment. This claim is based on the wording of the indictment that alleged that Tantalo was engaged in interstate commerce, whereas the proof at trial showed that corporations in which Tantalo was involved were engaged in interstate commerce rather than the extortion victim himself. Defendant relies on *Berger v. United States*, 295 U.S. 78 (1935), for the proposition that an accused must be definitely informed as to the charges against him so that he can prepare and present his defense and not be taken by surprise by the evidence offered at trial. However, in this case there was hardly any surprise to the defendant in view of the extensive testimony showing his awareness of Tantalo's relationship to the corporations. In fact, the defendant's interest in Tantalo seems to have been directly caused by his knowledge of the nature of Tantalo's corporate operations. As this court has recently noted, "convictions are not now set aside except for variance resulting in substantial prejudice to the defendant." *United States v. Knuckles*, 581 F.2d 305, 312 (2d. Cir. 1978). No such prejudice exists in this instance.

Defendant next argues that the government failed to prove a prima facie case for the jury that the defendant committed that extortion affecting interstate commerce as contemplated under the provisions of the Hobbs Act. The parties agree, citing *Stirone v. United States*, 361 U.S. 212, 218 (1960), that there are two essential elements to a Hobbs Act offense: (1) interference with interstate commerce and (2) extortion, alleged in this case to be under color of official right. The parties rely on the same decisions of this court to support their respective contentions as to each of these essential elements of the offense. On the interference with commerce point, the decision of this court in *United States v. Augello*, 451 F.2d 1167, 1169-70 (2d Cir. 1971) *cert. denied* 405 U.S. 1070 (1972), is dispositive. The government correctly notes that *Augello* held that the extortion falls within the purview of the Act even if its effect on commerce is "merely potential or subtle." There is no question but that the use of the Hobbs Act in the type of case here presented does take the statute to its outer limits, but such has consistently been the interpretation of the courts in virtually all of the circuits. The Congressional intent has consistently been found to be far-reaching, and no more than a minimal effect on interstate commerce is required. That minimum has been demonstrated in this situation.

The second element is extortion under color of official right. The scope of that element has been set forth in *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975), in which this court, *contra* to the interpretation of the defendant, expressly noted that a common law definition of extortion applies; that is, "a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress." (525 F.2d at 1100 n.7). The essential in the statute is the use of the office through acts unrelated to the duties of the public official but which could only be undertaken because of his official position. So long as the motivation for the payment focuses on the office of the recipient, the conduct falls within the ambit of the Hobbs Act. The

government's proof was in this instance sufficient to demonstrate that the defendant made his demands in connection with the misuse of the authority of his public office.

The final claim made by the defendant, other than his numerous exceptions to the judge's charge, concerns the status of Tantalo as a "middleman" between the defendant public official and the victim of the extortion. The defendant claims that the extortion victims were Alberti in the Second Count and either Hutchinson or his fictitious employer in the Third Count. Defendant claims that since neither Hutchinson nor Alberti were involved in interstate commerce, the proof was fatally deficient jurisdictionally under the Hobbs Act, and the indictment should have been dismissed. The short answer to defendant's contentions is that the government never claimed extortion from Alberti, but always extortion from Tantalo. The government claimed on Count II, and the jury apparently found, that the defendant extorted free car repairs from Tantalo for a friend of the defendant. The proof on Count III is equally clear that the defendant demanded the camera from Tantalo, not from Hutchinson, and intended at all times to obtain the camera from Tantalo. There is no merit in this claim of the defendant.

The main thrust of the defendant's challenges on appeal is directed to the charge given by the trial judge, and his refusal to adhere to some aspects of the requests to charge submitted by the defendant. Even most of these claims are without sufficient merit to require any extensive discussion by this court. For example, the defendant claims that the trial court gave a charge that favored the government to an extent tantamount to directing a verdict for the government. While it is true that the judge at first did provide a summary emphasizing elements of the government's evidence and discussing the defense case only briefly, nevertheless when this was called to the attention of the court, the jury was recalled and the court noted that it had inadvertently neglected to summarize all of the defense testimony, and thereupon proceeded to do so. We have reviewed the record

and find that on balance, and considered in its entirety, the charge was fair and unbiased. The district judge warned the jury of its obligation to consider "all the evidence in the case." (Defendant's App. A-108).

Another unpersuasive claim of the defendant is that the trial judge erred in refusing to incorporate request to charge No. 7 into the jury instructions[1]. The judge actually charged, however, that in order to convict the defendant, the jury had to find that Tantalo was the victim of the extortion. There were repeated instructions that the defendant must have received something of value from Tantalo. It was not necessary for the court to charge in the negative manner as an alternative, as requested by the defendant.

A final claimed error that requires only summary treatment is the defendant's claim that the judge's charge incorrectly defined "under color of official right" with respect to the definition of extortion. Defendant complains that the charge permitted the jury to convict if the jury found merely that the defendant took advantage of his position as a judge, even if there were no proof that the defendant intended to assist Tantalo. The law, however, specifically permits a conviction on the basis that defendant used his office to extort something from Tantalo, as noted *supra* in *United States v. Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975). It was not error for the district judge to deny the request of the defendant for a jury instruction that defendant must have promised some specific favor.

The defendant's challenges to the charge on the issue of

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[1] The request to charge No. 7 reads as follows: "Under the third count of the indictment, if you find that the defendant did commit the crime of extortion, you must also find, beyond a reasonable doubt, that the victim of the extortion was Albert Tantalo who was then engaged in interstate commerce and not Wesley Hutchinson (who was the person scheduled to appear before the defendant and whose name was supplied to Tantalo by government officials) or the latter's (Hutchinson's) fictitious boss or employer. If you have a reasonable doubt as to whether the victim of the extortion was Albert Tantalo as opposed to Wesley Hutchinson or his employer, then you must acquit the defendant." (Defendant's App. A-55).

intent require more considered review. The defendant claims that the court should have charged that before the defendant's use of his office be deemed criminal in violation of the Hobbs Act, it is necessary that the defendant have acted with criminal intent. The defendant notes that the only reference in the court's charge to the question of intent was a reference made with respect to Count III, and that even in that respect the intent charge was improperly limited to the intention of the defendant to commit an act forbidden by the statute, the natural consequence of which would be to obstruct, delay, or affect interstate commerce, whereas the court should have charged that the government bore the burden of proving as to Count III that the defendant intended to obstruct or affect commerce. As to the latter point, that may be disposed of by noting that the district judge in the instant case charged in accord with decisions of this court such as *United States v. Varlack*, 225 F.2d 665, 672 (2d Cir. 1955). As to the Third Count the court properly instructed the jury on the intent issue when it gave its charge as follows:

> "It is not necessary for the government to show that the defendant intended to specifically obstruct, delay or affect interstate commerce. All that is necessary as to this issue is that the government's evidence prove that the defendant intended to commit an act forbidden by the statute, the natural consequences of which would be to obstruct, delay or affect interstate commerce." (Defendant's App. A-98-9).

Unfortunately, the court did not charge so definitively as to the element of intent earlier in the charge in that portion dealing with the first two counts. There is no question but that the trial court would have been well advised to include specific language as to the requirement of intent when it dealt with the elements of a Hobbs Act offense at the outset of the charge. It did not do so. Nevertheless, as the government contends, the propriety of a trial court's charge should be reviewed in the light of an examination of the charge as

a whole. *Henderson v. Kibbe*, 431 U.S. 145, 152-53 n.10 (1977). *See United States v. Aulet*, 618 F.2d 182, 190 (2d Cir. 1980). First, it is important to keep in mind that the district judge, at the outset of his charge, cautioned the jury as follows: "You are not to single out one instruction alone as stating the law but must consider the instructions as a whole." (Defendant's App. A-89). The court then instructed the jury as to the definition of extortion under color of official right as meaning that a public official "unlawfully" obtains property of another without any right to do so and that a public official's "wrongful use of official power" is the basis for extortion under color of official right. The trial court did not stop there, however, and immediately added a passage that succinctly illustrates the court's meaning as to the wrongful element, which would perforce include an element of intent. The court charged as follows:

> "If you find beyond a reasonable doubt that the evidence has established that the defendant used the power and authority invested in him by reason of his public office to obtain money or property or services from the individuals named in the indictment, and that this money or property or services was not due or owing to the defendant nor to his office, that is sufficient to establish that the money or property or services was obtained by extortion under color of official right." (Defendant's App. A-94).

Use of power "to obtain money" clearly refers to the purpose of the defendant, and, in the context of the entire charge, this passage adequately instructed the jury to consider the defendant's state of mind.

At the close of its charge, after setting forth the elements of intent applicable to the Third Count, as noted above, the court then added the following general instruction on intent:

> "Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the opera-

tions of a person's mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statements made or done or omitted by the defendant and all other facts and circumstances in evidence which indicate his state of mind." (Defendant's App. A-100).

Those quoted portions of the charge adequately amplify the trial judge's earlier discussion of the wrongful purpose required to be entertained by the defendant.

In conclusion, this court finds that the challenges raised by the defendant on appeal, although thorough and imaginative, do not present a sufficient basis for this court to reverse the conviction of the defendant under Counts II and III of the indictment. The judgment of conviction is affirmed.

## ORDER OF UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

*Plaintiff-Appellee,*

*vs.*

CARL SCACCHETTI,

*Defendant-Appellant.*

CR. 80-46
C/A Docket 81-1155

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A certified copy of the mandate of the United States Court of Appeals for the Second Circuit dated January 4, 1982, having been filed in the office of the Clerk of this court on February 1, 1982, it is hereby

ORDERED, ADJUDGED AND DECREED that said mandate be, and hereby is, made the judgment of this court.

/s/ JOHN T. CURTIN
JOHN T. CURTIN
Chief United States District Court Judge

Dated: February 2, 1982.

# Opposition

Office - Supreme Court, U.S.
FILED
MAY 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1682

# In the Supreme Court of the United States

OCTOBER TERM, 1981

CARL SCACCHETTI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the evidence of the effect of petitioner's extortion on interstate commerce was sufficient to support his conviction under the Hobbs Act, 18 U.S.C. 1951.

2. Whether the district court's instruction to the jury on the issue of criminal intent was reversible error.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 668 F. 2d 643.

### JURISDICTION

The judgment of the court of appeals was entered on January 4, 1982. The petition for a writ of certiorari was filed on March 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of extortion under color of official right affecting commerce (Count II) and attempted extortion under color of official right affecting commerce (Count III), both in

violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to concurrent terms of one year and one day on each count (Pet. App. A-2).[1] The court of appeals affirmed (Pet. App. A-1 to A-11).

1. The evidence, as reflected in the opinion of the court of appeals, showed that petitioner was elected Judge of the City Court of Rochester, New York in 1972. That court has some jurisdiction over both civil and criminal matters. The criminal jurisdiction is limited to misdemeanor jury trials and arraignments and bail proceedings for both misdemeanors and felonies (Pet. App. A-2).

Petitioner was a social friend of Albert Tantalo, a businessman who owned various automobile and tire operations in the Rochester area. Tantalo purchased a large volume of various brands of tires from locations outside of New York (Pet. App. A-2). He also sold some of his tires through a mail order operation to customers who lived outside New York. In addition, Tantalo purchased wrecked cars from the State Farm Insurance Company for salvage and resale of the parts. Some of those cars came from outside New York, and some parts were sold outside New York (Pet. App. A-2 to A-3).

The evidence relevant to Count II of the indictment was that Tantalo had previously employed Christopher Alberti, who had been charged with speeding and driving while his license was suspended and who was scheduled to appear before petitioner (Pet. App. A-3). Alberti contacted Tantalo, who in turn telephoned petitioner. Petitioner told Alberti that he would see what he could do, and he did order several adjournments in the matter, ostensibly at the request of Alberti's lawyer, although Alberti in fact was not represented by counsel (*ibid.*).

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[1]Petitioner was acquitted on a separate count of extortion under color of official right (Count I).

While Alberti's case was pending, petitioner visited Tantalo at his business and told him that he would help with Alberti's case, but that he wanted Tantalo to take care of fixing a friend's car (Pet. App. A-3). Tantalo had the car repaired and petitioner subsequently disposed of Alberti's case as follows (*ibid.*):

> On motion of Judge Willis, the case of Christoford [*sic*] Alberti, the speeding charge is withdrawn and dismissed and the driving while license suspended is produced and withdrawn.[2]

The evidence relevant to Count III in the indictment showed that Tantalo was indicted in October 1979 on federal drug charges. After his arrest, Tantalo told the law enforcement authorities what he knew about petitioner and the Alberti case. The FBI agents then arranged to have Tantalo place telephone calls to petitioner, which the agents recorded (Pet. App. A-3 to A-4).

Tantalo asked petitioner to do whatever he could on behalf of Wesley Hutchinson, who was scheduled to appear before petitioner on assorted charges. In one conversation regarding Hutchinson, petitioner stated that he wanted Tantalo to procure a 35mm camera for him (Pet. App. A-4). The law enforcement officials procured the camera, and petitioner received it (*ibid.*).[3]

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[2]No one but the court reporter was present when petitioner dismissed the case. Judge Willis was, in fact, a private attorney who had previously been a judge in City Court. He did not represent and never had represented Chris Alberti in City Court (Tr. 373-374). The Assistant District Attorney assigned to City Court on that day did not recall withdrawing the charges against Alberti, nor did the District Attorney's case file reflect the customary notation indicating that the District Attorney would accept a reduction in charges (Tr. 357, 368). ("Tr." refers to the transcript before the district court.)

[3]The government offered no direct evidence that petitioner ever complied with Tantalo's request to do something for Hutchinson (Pet. App. A-4).

2. On appeal, the court of appeals held: (1) that the evidence on the effect of petitioner's extortion on interstate commerce was sufficient to support a Hobbs Act conviction (Pet. App. A-6), (2) that "extortion" under the Hobbs Act encompassed Tantalo's favors to petitioner, even absent proof of threat, fear or duress (Pet. App. A-6 to A-7), (3) that the district court properly charged the jury as to the identity of the victim of the extortion and did not err in declining to read petitioner's alternative instruction (Pet. App. A-8), and (4) that the charge on the issue of intent on Count II, read as a whole, adequately instructed the jury that it must find that petitioner had intended to commit an act forbidden by the statute, the natural consequence of which would obstruct, delay or affect interstate commerce (Pet. App. A-8 to A-11).[4]

**ARGUMENT**

1. Petitioner argues (Pet. 6-7) that the evidence of the jurisdictionally required nexus between the act of extortion and interstate commerce was insufficient.[5] Petitioner's

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[4]The court of appeals also rejected challenges to the sufficiency of the evidence presented to the grand jury (Pet. App. A-4 to A-5), a variance between the evidence and the indictment (*id.* at A-5), the proof as to the proper extortion victim (*id.* at A-7), and another objection to the trial judge's charge (*ibid.*).

[5]Petitioner also contends (Pet. 5-6) that his demands upon Tantalo did not amount to extortion because there was no evidence of force, pressure or compulsion. This contention ignores the plain language of the statute. The Hobbs Act forbids extortion by means of the "wrongful use of actual or threatened force, violence, or fear, *or* under color of official right." 18 U.S.C. 1951(b)(2) (emphasis added). If "fear" were an essential element of extortion "under color of official right," all cases of extortion under color of official right would already be covered by the prohibition against extortion by means of fear. Furthermore, the courts of appeals that have addressed the issue have unanimously agreed that proof of extortion under color of official right does not require any proof of threats, fear or duress. *United States* v. *Williams*, 621 F. 2d 123, 124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981) (citing decisions of eight other circuits).

basic contention (Pet. 5-6) is that Congress intended the Hobbs Act to be limited to the situation in which there is a "direct connection between extortion and interstate commerce," *United States* v. *Mattson*, Nos. 81-1302 and 81-1303 (7th Cir. Feb. 23, 1982), slip op. 6, *i.e.*, where payment is necessary for the victim to continue in interstate business. Although petitioner cites (Pet. 6) a number of cases involving this type of situation, none of them indicates that the Hobbs Act is limited to extortions directly affecting interstate commerce.

Moreover, nothing in the statute supports petitioner's limited construction. The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion * * *. The Act outlaws such interference 'in any way or degree.' " *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Consistent with this understanding of Congress's intent, courts of appeals have consistently recognized that the jurisdictional requirement in the Hobbs Act can be satisfied indirectly under a "depletion-of-assets" theory. Under this theory,

> commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods.

*United States* v. *Elders*, 569 F. 2d 1020, 1025 (7th Cir. 1978). See also *United States* v. *Harding*, 563 F. 2d 299, 302 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Brown*, 540 F. 2d 364, 373 (8th Cir. 1976); *United States* v. *Hathaway*, 534 F. 2d 386, 396-397 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Mazzei*, 521 F. 2d 639, 642-643 (3d Cir.), cert. denied, 423 U.S. 1014 (1975); *United States* v. *DeMet*, 486 F. 2d 816, 821-822 (7th Cir. 1973), cert. denied, 416 U.S. 969 (1974);

*United States* v. *Augello*, 451 F. 2d 1167, 1169-1170 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972).

In this case, the government alleged, and the jury found, that the victim, Tantalo, was engaged in interstate commerce and that petitioner's demands depleted the assets available to the victim's interstate business. That the actual value of the assets was not great is irrelevant under the Hobbs Act, since it applies to effects on commerce "in any * * * degree." 18 U.S.C. 1951(a). See *United States* v. *Boulahanis*, No. 81-1405 (7th Cir. May 6, 1982), slip op. 6. Thus, while the court of appeals may be correct that these facts approach the "outer limits" of the reach of the Hobbs Act, the decision upholding petitioner's conviction as supported by sufficient evidence conflicts with no decision of this Court or of any other court of appeals and therefore does not warrant review by this Court.[6]

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[6]The Seventh Circuit has ruled that the depletion-of-assets theory may not be appropriate when the victim is an individual who has no connection to interstate commerce, except as an employee of an interstate business. See *United States* v. *Mattson*, *supra*, at 8-9. See also *United States* v. *Boulahanis*, *supra*, at 7. While this case resembles *Mattson* in that the identified victim of the extortion is an individual, not a business, it differs from *Mattson* because the individual, Tantalo, was the proprietor of a business engaged in substantial interstate commerce. There is simply no basis for concluding that the Seventh Circuit would decide a case like this one differently from the Second Circuit. In addition, petitioner's argument would have been the same whether the indictment charged that Tantalo or his tire company was the victim, because he contends only that the depletion-of-assets theory is not a valid basis for a Hobbs Act conviction.

Even had petitioner raised the issue of the sufficiency of the nexus between the extortion and Tantalo's business, the evidence is plainly sufficient as to Count II. Clearly, the extortion of tire services for petitioner's friend directly depleted the assets of the interstate business. With regard to Count III, for which petitioner received only a concurrent sentence, the connection between the camera and the victim's business is less apparent, but, in light of the prior extortion directed at Tantalo's business, the jury could reasonably have found that the

2. Petitioner next challenges (Pet. 7-8) the district court's failure to give a specific charge on criminal intent as to Count II, like the one given as to Count III.[7] He also argues (Pet. 8) that this error was "compounded" by the district court's failure to focus on petitioner's use of his office as it related to his intent. As the court of appeals found, however, the charge, read as a whole, adequately instructed the jury on the issue of intent.

This Court has observed that instructions are not to be viewed in isolation but rather as part of the whole charge to the jury. *Henderson* v. *Kibbe*, 431 U.S. 145, 152-153 n.10 (1977). The district court told the jury to consider the instructions in their entirety, and defined extortion under color of official right to mean that a public official "unlawfully" obtains property of another without any right to do so. To illustrate this point, the district court added the following remarks that clearly include an element of intent (Pet. App. A-10):

> If you find beyond a reasonable doubt that the evidence has established that the defendant used the power and authority vested in him by reason of his public office to obtain money or property or services from the individuals named in the indictment, and that this money or property or services was not due or owing to the defendant nor to his office, that is sufficient to establish that the money or property or services was obtained by extortion under color of official right.

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extortion demand for an expensive camera was also an attempt to deplete the assets of Tantalo's interstate enterprise. Thus, there is sufficient, if not overwhelming, evidence to support petitioner's conviction on this count.

[7]The court of appeals explicitly approved the criminal intent instruction given on Count III (Pet. App. A-9).

To "use power" to obtain money plainly connotes an element of purposefulness or intent. Finally, the district court's general instruction on intent amplified its earlier discussion of the wrongful purpose the government was required to prove (Pet. App. A-10 to A-11):

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of a person's mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statements made or done or omitted by the defendant and all other facts and circumstances in evidence which indicate his state of mind.

As the court of appeals found (Pet. App. A-11), the entire charge amply instructed the jury on the requisite criminal intent.[8] The correctness of this very narrow ruling on particular facts is a question wholly unsuited to review by this Court.[9]

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[8]Petitioner's reliance (Pet. 8) on *United States* v. *Braasch*, 505 F. 2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975), is misplaced. The language petitioner relies upon arose in a discussion of whether there was a variance between indictment and proof, and does not describe the required proof of criminal intent. Nothing in *Braasch* requires the instruction petitioner requested below or is contrary to the court of appeals' analysis of the sufficiency of the charge as a whole in this case.

[9]Petitioner also argues (Pet. 8-9) that the district court erred in failing to instruct that, if the jury found that either Hutchinson or Alberti was in fact the victim of petitioner's extortion, then it must acquit on the respective counts. Initially, we note that although petitioner now directs this argument to both Counts II and III, the requested charge clearly related only to Count III (Pet. App. A-8 n.1), and he raised the issue in the court of appeals only with respect to Count III.

In any event, the courts below committed no error in this regard. The district court repeatedly instructed that the government had to prove that petitioner obtained something of value from Tantalo in order for the jury to find petitioner guilty of violating the Hobbs Act. It was not required to instruct the jury in the negative as requested by petitioner. Courts are under no duty to emphasize unduly matters that the defense

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1982

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may consider favorable to its case, *United States* v. *Martin*, 507 F. 2d 428 (7th Cir. 1974), particularly where the essence of the requested instruction has already been given. See, *e.g.*, *United States* v. *Sibley*, 595 F. 2d 1162 (9th Cir.), cert. denied, 444 U.S. 937 (1979); *United States* v. *Kelly*, 349 F. 2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966).

DOJ-1982-05

# Petitioner's Reply Brief

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# No. 81-1682

In The

## Supreme Court of the United States

October Term, 1981

CARL SCACCHETTI,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

**REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

This reply is submitted in order to address arguments first raised in the government's brief in opposition. The government has cited *United States* v. *Mattson*, 671 F 2d 1020 (7th Cir., 1982) decided ten days prior to the filing of the Petition for Writ of Certiorari.

1. As the government correctly argues, the *Mattson* case is factually distinguishable from the case of the petitioner; however, the *Mattson* case does highlight the jurisdictional nexus which must exist before there can be a valid conviction under the Hobbs Act. The Seventh Circuit has now held in

*Mattson* that the Hobbs Act is not violated *merely* because the victim of the extortion is an employee of a corporation or business which does (but not the employee) engage in interstate commerce and this, notwithstanding the fact that the subject matter of the extortion does relate to the eventual and potential business interests of the employer. *Mattson* holds that merely because the extortion of money from an individual in our society could arguably affect interstate commerce eventually is not sufficient reason to bring that extortion within the proscription of the Hobbs Act.

The petitioner's argument against the application of the Hobbs Act to the facts of his case is even more compelling than the rationale of the *Mattson* case because the motivation for the payment by the person complying with petitioner's demands had absolutely nothing to do with that person's or any other person's present ultimate interest in commerce.

Additionally, the *Mattson* case does highlight the reason why the district court and the Second Circuit were both in error in rejecting petitioner's request to charge that petitioner could not be convicted if the victim of the extortion was Alberti under the second count of the indictment and Hutchinson under the third count. In refusing to so charge, the petitioner was deprived of his right to an acquittal due to the absence of proof of the jurisdictional ingredient, i.e., an effect on interstate commerce.*

2. The government's brief in opposition, as did the Court of Appeals, glosses over the petitioner's argument that quintessential to a Hobbs Act extortion is the existence of a subject

*Based on Tantallo's admission (Tr. 127) that it was Hutchinson who would provide the camera and not Tantallo and that the petitioner asked him (Tantallo) whether Alberti would "take care" of fixing petitioner's friend's car (Tr. 58), the petitioner was entitled to a judgment of acquittal (Rule 29a motion, Tr. 434-435) and the requested charge. It has always been conceded by the government that neither Hutchinson nor Alberti was involved in an interstate business.

matter relating in some way or manner to the federal government's interest in a free flow of commerce. Essentially the government argues, as they have previously, that duress, fear or threats are not essential to extortion by one acting under color of official right and, as far as that argument goes, the petitioner agrees. However, if the victim, albeit involved in interstate comerce, furnishes money or "something of value" to a public official as the consideration for an official favor which does not even arguably involve a subject matter which touches upon interstate commerce, then even the existence of express or implied threats would not place the public official in violation of the Hobbs Act by extortion "under color of official right."

As the Seventh Circuit stated in *Mattson,* federal jurisdiction under the Hobbs Act is not conferred merely because some effect on commerce ultimately results from the extortion. The effect on commerce, whether it be direct or indirect, must be a natural and anticipated result of the conduct by the public official. The Hobbs Act should not be extended to the situation and context of the present case where the effect on commerce is gratuitously imposed by one whose motivation for doing so has absolutely nothing to do with commerce.

To extend the Hobbs Act to the facts of this case would bring within its sanctions any public official who accepts a bribe to fix a traffic ticket for the child or wife of the proprietor of an interstate business merely because the proprietor uses the treasury of that business as the source of the bribe money.*

Unless this Court is willing to restrict the Hobbs Act, under color of official right, to unlawful demands by public officials that relate to a subject matter realistically touching upon interstate commerce, the government, as it has in this case, will

*Tantallo, however, admitted that after he fixed petitioner's friend's car, he looked to Alberti who paid for the repairs (Tr. 152-153, 155-156).

continue to prosecute cases under the Hobbs Act which have no historical justification whatsoever, i.e., the protection of interstate commerce.

3. With respect to petitioner's claim that the jury was not fairly and adequately charged on the issue of criminal intent, the government counters by arguing that the language of *United States* v. *Braasch*, 505 F 2d 139, 151 (7th Cir., 1974), cert. denied, 421 U.S. 910 (1975) defining "use of office," is unnecessary and that the Court of Appeals was correct in rejecting this claim of error notwithstanding the absence of this language in the trial court's charge.*

In so holding the Court of Appeals has apparently determined that the phrase "unlawful use of office" to obtain money is universally accepted, without more, as a purposeful criminal act.

Unless this obviously erroneous ruling is overruled, the concept of *mens rea* as it applies to criminal law as a safeguard against the conviction for a negligent or even reckless act will lose its constitutional importance at least in this area of federal extortion under color of official right. As petitioner pointed out at the Court of Appeals, it is not inconceivable that a public official might carelessly or even recklessly express himself in such a fashion as can be reasonably interpreted as a demand based on his official title without consciously being aware that he has used his office in doing so.

It is submitted that the language of *Braasch* (missing in this case) to the effect that "the motivation [of the public official] for the payment [must] focus on the recipient's office" is

*In addressing itself to the essence of extortion under color of official right, the court in *United States* v. *Trotta*, 525 F 2d 1096 (2nd Cir., 1975), cert. denied, 425 U.S. 971 (1976) stated in adopting the language of *Braasch:*

> "[S]o long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951 (Hobbs Act)."

essential to a demand made intentionally and therefore criminally as distinguished from language or conduct of the public official made innocently, but carelessly capable of being interpreted as a sinister or intentional attempt to use his office to induce the payment of something of value.

For all of these reasons, as well as those advanced in our Petition for Writ of Certorari, the petition should be granted and the judgment reversed.

Respectfully submitted,

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